IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, *Plaintiff,* v. **JOHN S. BÁEZ DÁVILA,** *Defendant.*	**CRIMINAL NO. 18-283 (DRD)**

OPINION AND ORDER

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."* U.S. Const. Amend. IV.

Pending before the Court is Defendant, John S. Báez Dávila's *Motion to Suppress Evidence Illegally Seized from His Property and Residence.* (Dkt. No. 20). The United States filed its respective response in opposition thereto. See Dkt. No. 25. The Court referred this matter for Report and Recommendation to Honorable Magistrate Judge Marcos E. López. See Dkt. Nos. 21 and 22. Accordingly, the Magistrate held a Suppression Hearing on October 11, November 16 and December 19, 2018. Then, on January 14, 2019, the Magistrate issued a Report and Recommendation regarding the Defendant's motion to suppress. See Dkt. No. 55. On February 25, 2019, the Government filed objections to Report and Recommendation. See Dkt. No. 63.

The genesis of the instant case goes back to April 13, 2018, wherein the Puerto Rico Police Department's (hereinafter, "PRPD") Drug Unit of Juan Domingo, Bayamón, Puerto Rico executed

a search warrant at the residence of the Defendant, in the Municipality of Toa Baja, Puerto Rico. As a result thereof, the Defendant was arrested and charged by a Grand Jury with a Four-Count Indictment for possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841(a)(1); possession of a machinegun in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(B)(ii); and illegal possession of a machinegun, in violation of 18 U.S.C. § 922(o). See Dkt. No. 7.

The search warrant was issued on March 12, 2018 and was based on a sworn affidavit submitted by PRPD Officer Nancy Méndez-Acevedo, Badge No. 18214. The Defendant contends that "[t]he surveillance agent fail[ed] to realize that the structure had two apartments A & B and the number of the structure on road Flamboyan, which is 218. Apartment A (located on the left side) was where all the alleged criminal activity was observed. Apartment B is were[sic.] the defendant lives and no criminal activity was ever reported." See Dkt. No. 20. Accordingly, based on the illegal search performed on Apartment B of 218 Flamboyan St., Bo. San Ingenio, Toa Baja, Puerto Rico, the Defendant requests the suppression of all evidence seized from Apartment A and/or from Apartment B, and further suppression of any additional evidence that may have been obtained incident to or as a result of those searches. See Id.

The Magistrate issued a very thoughtful and developed report and recommendation to grant in part and deny in part the Defendant's motion. See Dkt. No. 55. The Government filed *Objection to the Magistrate Judge's Report and Recommendation Recommending Suppression of Evidence on the Right Side of the Residence Docket 55*, that upon a thorough examination of the Suppression Hearing transcript, the Court deems unpersuasive. See Dkt. No. 63. Thus, for the

reasons set forth below, the Court hereby **ADOPTS *IN TOTO*** the Magistrate Judge's **REPORT AND RECOMMENDATION** and accordingly, **GRANTS in part and DENIES in part** the Defendant's motion to suppress.

I. REFERRALS TO MAGISTRATE JUDGES

The Court may refer dispositive motions to a United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). See Local Rule 159; Matthews v. Weber, 423 U.S. 261 (1976). Any party may contest the Magistrate Judge's report and recommendation by filing its objections. Fed. R. Crim. P. 59(b); 28 U.S.C. § 636(b)(1). "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Id. "A party that files a timely objection is entitled to a de novo determination of 'those portions of the report or specified proposed findings or recommendations to which specific objection is made.' " Sylva v. Culebra Dive Shop, 389 F.Supp.2d 189, 191-92 (D.P.R. 2005)(citing United States v. Guzman-Batista, 948 F. Supp. 2d 194, 196 (D.P.R. 2013).

"Absent objection, . . . [a] district court ha[s] a right to assume that [the affected party] agree[s] to the magistrate's recommendation." Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985), *cert denied*, 474 U.S. 1021 (1985). Additionally, "failure to raise objections to the Report and Recommendation waives that party's right to review in the district court and those claims not preserved by such objections are precluded upon appeal." Davet v. Maccarone, 973 F.2d 22, 30-31 (1st Cir. 1992); see Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir.

1994) (holding that objections are required when challenging findings actually set out in a magistrate's recommendation, as well as the magistrate's failure to make additional findings); see also Lewry v. Town of Standish, 984 F.2d 25, 27 (1st Cir. 1993) (stating that "[o]bjection to a magistrate's report preserves only those objections that are specified"); Borden v. Sec. of H.H.S., 836 F.2d 4, 6 (1st Cir. 1987) (holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised"). Hence, the standard for review of an objected report and recommendation is *de novo* review of those matters properly objected. See Borden v. Secretary of H.H.S., 836 F.2d at 6.

In order to accept unopposed portions of the Magistrate Judge's report and recommendation, the Court need only satisfy itself that there is no "plain error" on the face of the record. See Douglass v. United Servs. Auto, Ass'n, 79 F.3d 1415, 1419 (5th Cir. 1996) (*en banc*) (extending the deferential "plain error" standard of review to the legal conclusions of a magistrate judge that were not objected to); see also Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982) (*en banc*) (appeal from district court's acceptance of a magistrate judge's findings that were not objected to was reviewed for "plain error"); see also Nogueras-Cartagena v. United States, 172 F.Supp. 2d 296, 305 (D.P.R. 2001) (finding that the "Court reviews [unopposed] Magistrate's Report and Recommendation to ascertain whether or not the Magistrate's recommendation was clearly erroneous") (adopting the Advisory Committee note regarding Fed. R. Civ. P. 72(b)); see also Garcia v. I.N.S., 733 F.Supp. 1554, 1555 (M.D.Pa. 1990) (finding that "when no objections are filed, the district court need only review the record for plain error").

As the Government has only objected to the Magistrate's determination to suppress the items recovered during the search conducted after the security sweep of the right-side

apartment, the Court shall conduct a *de novo* review as to that portion of the report and recommendation only. Whereas, the "plain error" standard will be used for the portions that have not been objected to.

II. THE MAGISTRATE JUDGE'S FINDINGS

A. The Magistrate's Findings of Fact

After presiding over a three-day evidentiary hearing, the Magistrate issued a lengthy and well-developed report and recommendation granting in part and denying in part Defendant's motion to suppress, although the Court finds this matter is a close issue. As the Court finds the Magistrate's findings of fact are accurate and consistent with the evidence presented during the Suppression Hearing, the Court adopts and incorporates herein all findings of facts as discussed by the Magistrate Judge. See Dkt. No. 42.

> "On April 4, 2018, Officer Nancy Méndez of the Puerto Rico Police Department began surveilling a property on Flamboyán Street in the Municipality of Toa Baja ("the property"). At the time, the Defendant was living in the right side of the property. After the initial surveillance on April 4, 2018, Officer Méndez returned to the property three times: on April 7, 2018, April 11, 2018, and April 12, 2018. Over the course of the investigation, the illegal activities that Officer Méndez observed all took place on the left side of the property. Officer Méndez did not investigate who owned the property and who lived there. On April 12, 2018, Officer Méndez set forth her observations in a sworn statement in order to request a search warrant.
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> The statement describes the structure to be searched as a cement structure, painted white and grey, with a terra-cotta parapet with deteriorated paint, "arch and baluster balcony," white French windows, and black railings. The statement specifies that the structure has two doors: a white French door on the left and a white glass door on the right. The statement describes the property to the right of the structure to be searched as a cement residence painted pink and white with white railings, white Miami-style windows, and the number 218 on it. The statement describes the property to the left of the structure to be searched as a cement residence painted light grey with a brown door, white railings, white glass windows, and a balcony with ornamental blocks. A picture of the property to be searched was included in the sworn statement.

A search warrant was issued by the Superior Court on April 12, 2018. The next day, April 13, 2018, the warrant was executed. That day, Wanda Dávila-Rivera, the Defendant's mother, arrived at the property at 7:00 am, when the Defendant was still there. The Defendant, however, left the property at around 8:30 am. Juan Ángel Dávila, Ms. Dávila-Rivera's father and the Defendant's grandfather, arrived at the property between 11:00 am and noon. Ms. Dávila-Rivera left the property at 2:00 pm. The Defendant's grandfather remained at the property. Between 1:00 pm and 2:00 pm, the Defendant returned to the property.

Between fifteen minutes and one hour after the Defendant's return, Officer Méndez, Officer Elisabeth Mateo, Officer Francisco Vázquez, and Officer Ivy González arrived at the property, along with other officers. According to Officer González, at the time she arrived at the property, Mr. Dávila was emerging from the left side of the property. An officer asked Mr. Dávila to open the door on the left side of the property. Mr. Dávila replied that he did not live there and did not have the key. Mr. Dávila was escorted to a chair in a different area and asked to sit down. The officers proceeded to break down the door and enter the left side of the property to perform a security sweep.

While some of the police officers were performing the security sweep, Officer González, who was on the porch, observed the Defendant through the windows of the right side of the property and instructed him to come out. Officer González ordered him to the floor and patted him down. Then, the officers performed a security sweep of the right side of the property. The Defendant remained face down on the floor. When the officers finished the security sweep, the Defendant stood up and Officer González gave him the search warrant. Then, Officer González searched both sides of the property."

B. The Magistrate's Conclusions of Law

Once the presentation of evidence culminated, the parties argued their positions via final arguments before the Magistrate. Specifically, the Government argued that the *Franks* Hearing requirements were not met as the Defendant failed to present evidence that establishes "a reckless disregard of the truth by the agent that did the surveillance in her sworn statement."[1] The Government further argues that the agents at no point in time had reason to realize that the property had two apartments as "there's no distinction on the parking area, there's no distinction on the mail boxes, there's no distinction on the water meters or power meters. There's no

[1] Transcript of Proceedings, December 19, 2018, Dkt. No. 66, p. 28, l. 16-22.

distinction on the doors themselves even if the residents did mention 218 and the other residents around it also having 218."[2] More importantly, "[t]he residence, as described in Exhibit 3 [Dkt. No. 56-3] in the affidavit and . . . search warrant order, always mentioned that it has two front doors."[3] According to the Government, the only thing that might have led the officers to believe that there were two separate apartments in the structure was that they noticed there was no connection from one side to the other.[4]

The Defendant countered by stating that the picture of the structure included in the affidavit[5] clearly identifies the apartment of the left side of the structure as the right side is very obscure, almost unperceivable. Moreover, the apartments have separate kitchens, two metal gates to enter separately and a solid wall that is perceivable from the left and right side that completely separates each unit. Furthermore, as they enter each apartment each has its own kitchen, living room and dining room.[6]

In addition to considering the Government's lone argument, that is, the reasonableness of the search conducted on the right side of the structure, the Court finds the Magistrate went to considerable lengths to consider all the applicable exceptions to the search warrant requirement as to the right-side apartment of the structure that may apply in the instant case. Nevertheless, the Magistrate concluded that "the officers' failure to realize the overbreadth of the warrant was not reasonable."[7]

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[2] Id. at 32, l. 14-20.
[3] Id. at l. 21-23.
[4] Id. at 33, l. 19-24.
[5] Government's Exhibit 3, Dkt. No. 56-3.
[6] Transcript of Proceedings, December 19, 2018, Dkt. No. 66, pp. 38, l. 7-25 to 39, l. 3.
[7] Dkt. No. 55 at 13.

As the Defendant failed to object to the Magistrate's determination as to the non-applicability of the Franks v. Delaware, 438 U.S. 154 (1978) doctrine in the case at bar, and the Court finds that it was properly disposed of by the Magistrate, the Court will not dwell into this argument.

Thus, the Court shall discuss the argument brought by the Government and the Magistrate's reasons for denying the coverage on the right-side. However, "where, as here, a [Magistrate] has produced a first-rate work product, a reviewing tribunal should hesitate to wax longiloquence simply to hear its own words resonate." In re San Juan Dupont Plaza Hotel Fire Litig., 989 F. 2d 36, 38 (1st Cir. 1993); see Vega-Morales v. Commissioner of Social Security, 380 F. Supp. 2d 54, 60 (D.P.R. 2005) (quoting Lawton v. State Mut. Life Assu. Co. of Am., 101 F. 3d 218, 220 (1st Cir. 1996)). As the Magistrate's analysis is already in-depth and precise, the Court prefers to use selected passages of the report and recommendation instead of paraphrasing what is already a "first-rate work product."

The Magistrate discussed the validity of the search conducted at the right side of the structure, which is the lone argument objected by the Government. At the outset, the Magistrate adequately explains the leading case on the matter: Maryland v. Garrison, 480 U.S. 79 (1987) as follows:

> "In Maryland v. Garrison, law enforcement officers obtained a warrant authorizing a search of "premises known as 2036 Park Avenue third floor apartment." 480 U.S. at 80. At the time the officers applied for the warrant, they reasonably believed that only one apartment existed on the third floor, when in fact the third floor was divided into two apartments. Id. The officers executed the warrant and began searching one of the apartments. Id. Only after discovering contraband in the apartment did they become aware that the third floor contained two apartments. Id. at 81. The Supreme Court held that the validity of the search depended on "whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." Id. at 88. This is

> because the officers "were required to discontinue the search of [the] apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant."

Id. at 87; Dkt. No. 55 at 11. When applying this legal framework to the instant fact pattern, the Magistrate stated the following:

> The Defendant contends that at the moment the warrant was executed, it should have been obvious to the officers that the property was divided into two apartments. In order to address this argument, the manner in which the execution of the warrant was performed must be examined. Before searching either side of the property, the officers conducted a security sweep. Prior to the security sweep, there was no reasonable way for the officers to ascertain that the property was divided into two apartments. Hence, the officers were entitled to conduct security sweeps of both sides of the property. See United States v. Martins, 413 F.3d 139, 149 (1st Cir. 2005) (abrogated on other grounds) ("Although Buie itself speaks of protective sweeps incident to arrest, this court has employed the doctrine to allow protective sweeps in conjunction with the execution of search warrants."). Because at the time the officers entered the right side, they did not yet have reason to believe that the right side constituted a separate apartment, any illegal items found during the security sweeps of both sides of the property should not be suppressed.
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> During the security sweeps, however, several features of the apartments should have put the officers on notice of the risk that the search warrant was overbroad in including the right side of the property, where no observations of illegal activity had been made. First, there was a cement wall that separated the two apartments. It was not possible to access the right-side apartment from inside the left-side apartment, and vice versa. Second, the left-side apartment had a furnished living room, kitchen, bathroom, and furnished bedroom. Similarly, the right-side apartment had at least two bedrooms, one of which was furnished, a furnished living room, a kitchen, and a bathroom. Third, the left-side apartment and the right-side apartment both contained signs of occupancy, which were distinguishable from each other. While the left-side apartment contained uniforms in a closet, the right-side apartment contained men and women's clothes and shoes in a closet, as well as a laundry hamper.
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> Under these circumstances, the officers' failure to realize the overbreadth of the warrant was not reasonable. They "were required to discontinue the search of [the] apartment as soon as they discovered that there were two separate units," before searching the right-side apartment. Garrison, 480 U.S. at 87. However, given that the illegal activities that Officer Méndez observed all took place on the left side of the property, a fact which the officers were aware of because it was set forth in Officer Mendez's sworn statement, the officers were

> entitled to search the left-side apartment. Therefore, any items found pursuant to a search of the left-side apartment should not be suppressed. As to the right-side apartment, however, the officers could have either asked Defendant for his consent to search or sought a new search warrant for the right-side apartment.

Id. at 12-13.

As the Magistrate Judge's report and recommendation is quite thorough, the Court shall proceed to summarize the issue in a few words. First, the Magistrate finds that officers were entitled to conduct security sweeps to both sides of the property, thus, any evidence recovered during the security sweeps should not be suppressed. At that time, the officers had no reason to believe the structure was divided into two apartments. Second, during the security sweeps, several features of the apartments should have put the officers on notice of the risk that the search warrant was overbroad in including the right side of the structure, where no illegal activity had been observed by Officer Méndez during the surveillances. Specifically, the cement wall that separated the two apartments; the fact that each apartment had its own living room, kitchen, dining room, bathroom and bedrooms and; the signs of occupancy between the apartments which were distinguishable.[8] Third, as there were clear signs that the residence was divided into two separate apartments, the Magistrate found that the officers' failure to realize the overbreadth of the warrant did not meet the threshold of being reasonable. Fourth, and most critical, the Magistrate found that as all illegal activity was observed in the left-side apartment, the officers should have asked the Defendant for consent to search the property or sought a new search warrant as to the right-side apartment. Accordingly, all items seized during the right-side

[8] Officer González testified that during the execution of the search warrant, they found on the left-side apartment a box in the closet with some uniforms. *Transcript of Proceedings, November 16, 2018*, Dkt. No. 65 at 37, l. 4-7. Whereas, she testified that in the right-side apartment, they found men's and women's clothes, see id. at 24, l. 4-7, and shoes, see id. at 36, l. 8-13, in the closet.

apartment search after the security sweeps, should be suppressed. Dissatisfied with the Magistrate's findings, the Government filed objections.

III. THE GOVERNMENT'S OBJECTIONS

In essence, the Government argues the Magistrate erred in suppressing all items that were seized from the search that was conducted on the right side of the residence, after the security sweep, as he did not make a finding of any deliberate, reckless or grossly negligent conduct by the police officer or recurring or systemic negligence. Moreover, the Government contends that even should a Fourth Amendment violation has taken place, "the suppression of evidence would be an improper remedy, as such suppression would have no deterrent effect and would merely impose a heavy cost on society." Dkt. No. 63 at p. 9. Finally, the Government argues that the Magistrate's report would not serve the salutary purpose of the Exclusionary Rule. Id. Armed with the Magistrate's report and recommendation and the Government's objections, the Court may begin its own analysis. As the Government divides its objection into several sections, the Court will address them *in seriatim*.

The Court starts the instant discussion by finding the Magistrate's conclusions of law and its underlying analyses are substantiated by the facts and applicable jurisprudence. Moreover, the Magistrate's factual findings favored the Government's version of facts as much as possible. Yet, the Magistrate recommends that the items seized from the search to the right-side apartment be suppressed, except as those found during the protective sweep. The Court agrees.

A. The officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable:

The Government submits the Magistrate committed clear error as it presented ample evidence during the Suppression Hearing that would make the search on the right-side apartment

objectively understandable and reasonable. Specifically, the Government argues that "[t]he property did not have multiple mailboxes or carports; residents parked on the street in front of the property but there were no markings on the street distinguishing any parking spots." Dkt. No. 63 at 3-4. Additionally, "[t]he property had only one meter from the Puerto Rico Electric Power Authority and one meter from the Puerto Rico Sewer Authority." Id. Furthermore, the residence "had only one back door, and the backyard is not divided by any walls." Id.

The Court's analysis commences by noting that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. In Garrison, 480 U.S. at 80, "Baltimore police officers obtained and executed a warrant to search the person of Lawrence McWebb and 'the premises known as 2036 Park Avenue third floor apartment.' " When conducting the search, "they reasonably believed that there was only one apartment on the premises described in the warrant." Id. The reality was that the third floor was divided into two apartments, one belonging to McWebb, and the other to an individual named Garrison, who was ultimately arrested as a result thereof. Before realizing they were executing the search warrant in a separate apartment, they found contraband and arrested Garrison for violations of Maryland's Controlled Substances Act. See Id.

The Supreme Court ultimately held, "the validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." Id. at 88. More importantly, the Supreme Court held that the officers "were required to discontinue the search of [the] apartment as soon as they discovered that there were

two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant." Id. at 87. (Emphasis ours). Thus, "[t]he police can validly search a multi-unit dwelling even if the search warrant was only for a single-unit dwelling, provided the police reasonably believed that the dwelling contained only one unit." United States v. Mousli, 511 F.3d 7, 12 (1st Cir. 2007).

Consonant with Garrison, *supra*, the Fifth Circuit specifies that "[t]he warrant of a multi-unit structure will be valid where (1) there is probable cause to search each unit; (2) the targets of the investigation have access to the entire structure; or (3) the officers reasonably believed that the premises had only a single unit." United States v. Perez, 484 F.3d 735, 741 (5th Cir. 2007).

Whereas, the Magistrate found that Officer Méndez reasonably believed that the property contained only one unit, and "prior to the security sweep there was no reasonable way for the officers to ascertain that the property was divided into two apartments". However, as there was a wall that separated the apartments, each had a living room, a kitchen, dining room, bathroom and bedrooms, the officers should have sought the consent of the defendant or a warrant to search the right-side apartment. Thus, the officers' failure to realize the overbreadth of the warrant was not reasonable. The Court agrees.[9]

The Court will first examine the contents of the search warrant. On the surveillance of April 4, 2018, Officer Méndez made the following observations: "[t]he motorcycle guy took out of the backpack a large plastic bag with shavings and gave it to the one wearing black, who took

[9] The Court notes that the matter was close because the two properties, (A) and (B) had only one meter to register electric power and one meter to regulate water consumption. Further, there was only one mailbox and one back door in the backyard of both apartments (A) and (B). The backyard was not facially divided by any wall. However, upon a careful review of the suppression hearing transcript and supported documentation, these factors to not deviate the Court from the Magistrate's determination.

the bag and went into the residence through the door on the left, at which point the officer lost sight of him." Dkt. No. 56-3 at 5. (Emphasis ours). Then, on April 11, 2018, Officer Méndez made the following observations: "[a]fter several minutes she was able to observe that the iron gate on the left opened and two individuals came out of the residence." Id. (Emphasis ours). One of the individuals was carrying what Officer Méndez described as a "bag of dog food that was yellow with blue letters." Id. Officer Méndez followed the two individuals who stopped at Matienzo Cintrón Housing Project wherein one of the individuals "took out of the yellow bag a clear plastic bag containing and undetermined number of plastic baggies containing marijuana shavings and handed it over to [another individual]." Id. Upon a careful reading of the search warrant, the Court can safely conclude that all the illegal activity that Officer Méndez observed happened at the left-side of the property. There are no references as to illegal activity in the right-side apartment in the search warrant and the officer's affidavit included thereto.

For this reason, the officers should have realized when conducting the security sweep that searching the right-side apartment would be an overbreadth of the search warrant. There were many signs that were unreasonably disregarded by the officers as to the separate nature of the units, the most apparent being the wall that divided each unit, but most critical, the metal gates that were separately closed and opened by each tenant.[10] More importantly, Garrison is distinguishable from the instant case as herein, the contraband was found after the officers realized they were searching a different apartment. Whereas, in Garrison, the officers realized they were executing the warrant in a different apartment after seizing the contraband. See *supra.*

[10] See Government Exhibits 1, 2, 20 and 21, Dkt. Nos. 56-1, 56-2, 56-18 and 56-19.

However, assuming for the sake of the argument that the initial separation of the wall and metal gates did not put the officers on notice, upon their security sweeps to the apartments, they found all elements that are usual in a single-unit, to wit, a kitchen, bathroom, living room, dining room, bedrooms, and clothing. Thus, the officers were on notice of the risk that this was a unit erroneously included within the terms of the warrant. See Maryland v. Garrison, *supra*. Consequently, the Court finds the officers' failure to realize the overbreadth of the warrant was indeed unreasonable.

B. The good faith exception should apply because the officers did not believe the property was divided into two separate apartments

It is the Government's position that when executing the search warrant, the PRPD officers were acting in good faith under the belief that a Puerto Rico Municipal Judge had authorized the warrant which allowed them to enter to the entirety of the residence, and seize all illegal items found in the residence. According to the Government, "[e]ven if Agent Méndez' affidavit failed to support a finding of probable cause justifying the search of the right side of the residence, 'suppression of evidence is not the inevitable consequence.' " United States v. Mykytiuk, 402 F.3d 773, 777 (7th Cir. 2005) (citing United States v. Leon, 468 U.S. 897 (1984)). The Government argues that, " '[a] facially valid search warrant issued by a neutral magistrate will be upheld if the police relied on the warrant in good faith.' " Mykytiuk, 402 F.3d at 777." Specifically, the Government contends that the PRPD officers focused on the fact that the front doors of the residence were not labeled, no parking sports were assigned, the residence only had one water meter, one power meter and one mailbox. Most importantly, "[a]gents were aware that Báez Davila had been observed by PRPD agent Nancy Mendez, entering the left side of the residence during the surveillance." Dkt. No. 63 at 7. Accordingly, when they saw the Defendant exiting the right side

of the property, they believed he had access to all the residence. Id.

The Court finds that the set of events in the instant case, fail to warrant the good faith doctrine exception. The Court explains. Initially, it is reasonable to believe the PRPD officers objectively relied on the search warrant when performing the security sweeps on each apartment. But, it is unreasonable to believe the officers did not realize the separate nature of units A and B when entering the right-side apartment. The most critical issue is that there is a wall that completely separates the apartments, thus, there is no access from one apartment to the other. Moreover, the metal gates provide separate access to each apartment.[11] The search warrant was clearly intended for the left-side apartment as all the illegal activity was observed from the left-side apartment. Accordingly, the Court finds that good faith would have been discontinuing the search and either requesting voluntary consent from the Defendant or requesting a new search warrant as to the right-side apartment before a Municipal Judge.

C. Suppression Would Not Serve the Salutary Purpose of the Exclusionary Rule

The Government argues that "[t]he exclusionary rule is 'designed to safeguard the Fourth Amendment rights generally through its deterrent effect.'" Dkt. No. 63 at 8. Accordingly, as the Magistrate Judge did not make any finding "suggesting that any police officer engaged in deliberate, reckless, or grossly negligent conduct, or that the police officers' actions in this case formed part of a pattern of recurring or systemic negligence" suppression is an improper remedy as it would not have a deterrent effect and would impose a heavy burden on society. Id. at 9.

"[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes

[11] Id.

of the exclusionary rule." United States v. Leon, 468 U.S. 897, 918 (1984). Along these lines, the Supreme Court has held that,

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

Michigan v. Tucker, 417 U.S. 433, 447 (1974). (Emphasis ours). Accordingly, "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." United States v. Peltier, 422 U.S. 531, 542 (1975). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 555 U.S. 135, 144 (2009).

In the case at bar, the security sweep and search of the left-side apartment was certainly within the terms of the search warrant. Although the PRPD officers did not have knowledge of the separate nature of the residence at first, upon performing the security sweep of the right-side apartment they were effectively on notice of this important detail. Thus, the officers had knowledge that conducting the search on the right-side apartment would be a Fourth Amendment violation unless voluntary consent was obtained from the Defendant or a new search warrant as to the right-side of the residence was obtained before a Municipal Judge. Therefore, the Court finds that the PRPD officers were grossly negligent in conducting the search

on the right-side apartment knowing the search was beyond the terms of the search warrant, thus, incurred in a clear violation of the Defendant's Fourth Amendment right.

VI. CONCLUSION

The Court finds that the Government failed to establish "clear error" in the findings in the Magistrate's Report and Recommendation as to the motion to suppress. Moreover, the Government has failed to demonstrate that a good faith exception is applicable to the case at bar or that the suppression would not have a deterrent effect.

Hence, the Court finds the Magistrate's recommendations are reasonably based on the witnesses' testimonies, and supporting documentation, and no "clear error" has been established as to his findings. Accordingly, the Court hereby **ADOPTS *IN TOTO*** the Magistrate Judge's **REPORT AND RECOMMENDATION** and, **GRANTS in part and DENIES in part** the Defendant's motion to suppress. (Dkt. No. 20).

IT IS SO ORDERED.

In San Juan, Puerto Rico, on this 4th day of April, 2019.

S/Daniel R. Domínguez
Daniel R. Domínguez
United States District Judge

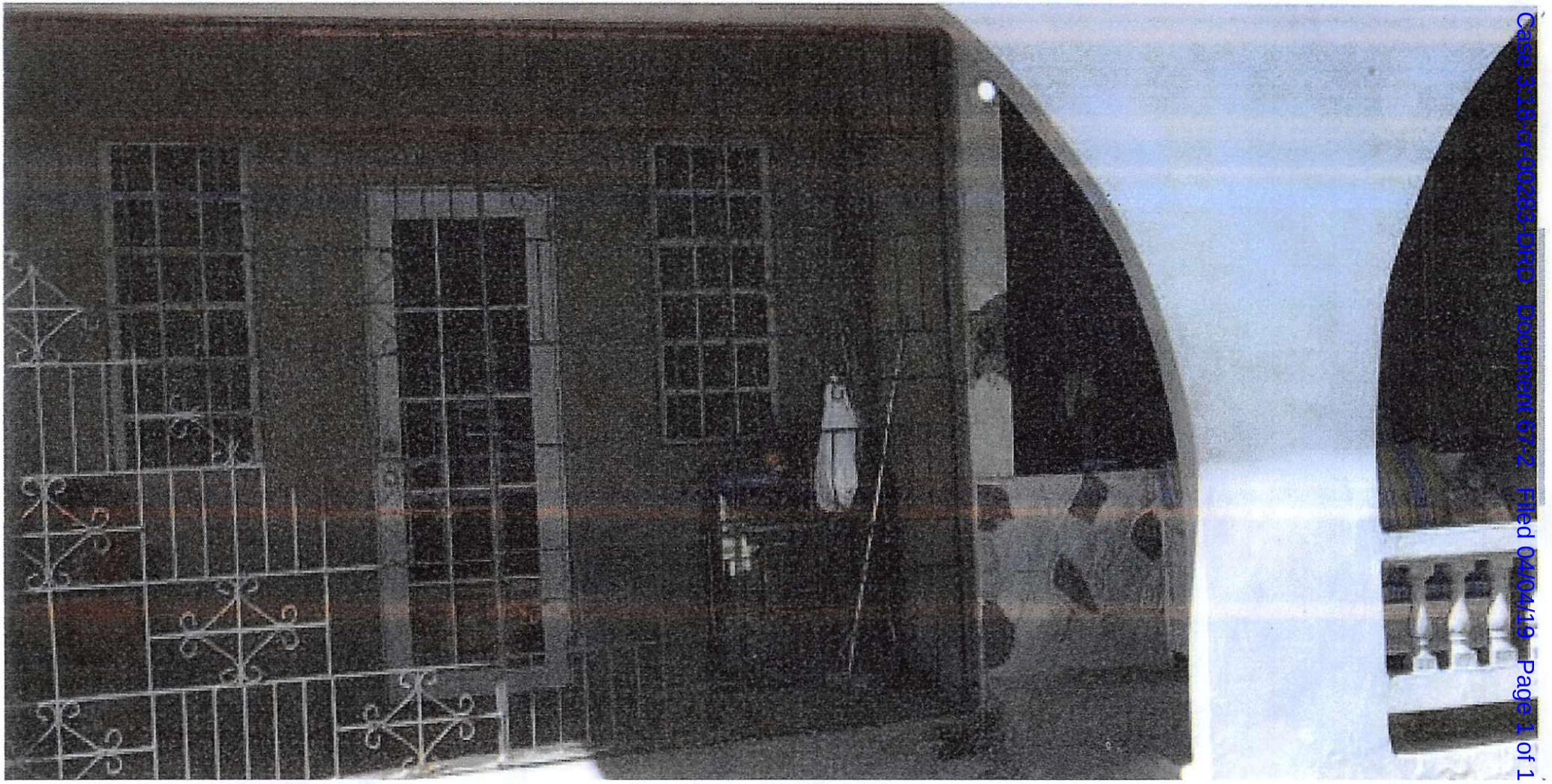
Government ID

18-283 (DRD)

GOVERNMENT EXHIBIT

18-283 (DRD)

PENGAD 800-631-6989



Government ID
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